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09/859,716	05/17/2001	Raymond S. Wach	OID08-10	4114

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EXAMINER
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TAYLOR, NICHOLAS R

ART UNIT	PAPER NUMBER
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2141

MAIL DATE	DELIVERY MODE
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10/02/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 09/859,716	<b>Applicant(s)</b> WACH, RAYMOND S.	
	<b>Examiner</b> NICHOLAS TAYLOR	<b>Art Unit</b> 2141	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 25 August 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1,4-7,11-15,19,22-25,29,32-35,37 and 38 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,4-7,11-15,19,22-25,29,32-35,37 and 38 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 17 May 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114.

Applicant's submission filed on August 25th, 2008, has been entered.

2. Claims 1, 4-7, 11-15, 19, 22-25, 29, 32-35, 37, and 38 have been presented for examination and are rejected.

### ***Response to Arguments***

3. Applicant's arguments filed August 25th, 2008, with respect to the claims have been considered but are moot in view of the new grounds of rejection.

### ***Claim Objections***

4. Claims 11 and 29 are objected to because of the following informalities: the use of "comprise provide" in both claims and a missing comma from "said target said target" in claim 11. Appropriate correction is required.

***Claim Rejections - 35 USC § 101***

5. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 19, 22-25, 29, 32-35, and 38 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. Specifically, the “computer usable medium” would reasonably be interpreted by one of ordinary skill in the art as failing to fall within a statutory category of invention, because applicant’s disclosure defines a computer usable medium to include propagated signals (e.g., digital or analog signals as explicitly defined in the last paragraph of pg. 5 of the specification).

Thus, in the context of the disclosure and claims in question, one of ordinary skill in the art would reasonable interpret the claimed subject matter to encompass intangible embodiments. As such, the claimed invention is not limited to a process, machine, manufacture, or composition of matter. Thus, the claimed limitations are not limited to statutory subject matter and are therefore nonstatutory.

***Claim Rejections - 35 USC § 102***

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty

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defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

7. Claims 1, 4-6, 11-15, 19, 22-24, 29, 32-33, 35, 37, and 38 are rejected under 35 U.S.C. 102(e) as being anticipated by Landan (U.S. Patent 6,449,739).

8. As per claims 1 and 19, Landan teaches a method of performing distributed testing of a target comprising the steps of:

identifying a first and a second system which meets a predetermined criteria including a physical location of said system, said first system having a different owner than an owner of said target and an owner of said second system; (Landan, col. 5, lines 17-30 and fig. 1 remote systems; see also col. 6, lines 6-20 and 44-46; see also overview of col. 7, lines 14-45)

scheduling said first and second system to provide load to said target, (Landan, see, e.g., col. 6, lines 21-29 where scheduling is assigned; see also col. 7, lines 57-66)

wherein said load comprises provision of a plurality of virtual users which perform a variety of transactions with the target being tested, (Landan, see col. 5, lines 17-30 and transactions of col. 6, lines 47-64 describing the use of virtual users)

said target comprising an object-oriented software component, said object-oriented software component usable to build an application; and (Landan, col. 4 line 63 to col. 5, line 11; see also col. 9, lines 39-55)

deploying said first and said second system at the scheduled time, said first and said second system providing load to said target (Landan, see, e.g., col. 6, lines 21-29 where scheduling is assigned; see also col. 7, lines 57-66).

9. As per claims 4 and 22, Landan teaches the system further wherein said predetermined criteria further include additional criteria selected from the group comprising: sizes of said systems, speeds of said systems, and availability of said systems (Landan, see criteria of col. 5, lines 17-30 and fig. 1; col. 6, lines 6-20 and 44-46; see also overview of col. 7, lines 14-45).

10. As per claims 5 and 23, Landan teaches the system further wherein said first and said second system provides load across a network to said target (Landan, col. 5, lines 17-30 and fig. 1 where load is provided to the target; see also col. 6, lines 6-20 and 44-46; see also overview of col. 7, lines 14-45).

11. As per claims 6 and 24, Landan teaches the system further including the step of defining a catalog of potential systems which meet said predetermined criteria and wherein said step of identifying a first and second system is performed from said catalog of potential systems (Landan, col. 5, lines 17-30 and fig. 1 remote systems; see also col. 6, lines 6-20 and 44-46; see also overview of col. 7, lines 14-45).

12. As per claims 11 and 29, Landan teaches a method of performing distributed monitoring of a target comprising the steps of:

identifying a first and a second system which meets a predetermined criteria including a physical location of said system, said first system having a different owner

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than said target and an owner of said second system; (Landan, col. 5, lines 17-30 and fig. 1 remote systems; see also col. 6, lines 6-20 and 44-46; see also overview of col. 7, lines 14-45)

scheduling said first and said second system to monitor said target, (Landan, see, e.g., col. 6, lines 21-29 where scheduling is assigned; see also col. 7, lines 57-66)

said target comprising an object-oriented software component, said object-oriented software component usable to build an application; and (Landan, col. 4 line 63 to col. 5, line 11; see also col. 9, lines 39-55)

deploying said first and said second system at the scheduled time, (Landan, see, e.g., col. 6, lines 21-29; see also col. 7, lines 57-66)

said first and said second system providing monitor functions to said target where the monitor functions comprise provide testing of deployed targets in order to detect and report performance problems (Landan, see col. 5, lines 52-67 and col. 8, lines 11-20 where monitoring and performance problem reporting are provided).

13. As per claim 12, Landan teaches the system further wherein said target comprises a web site (Landan, col. 5, lines 17-30 and fig. 1 overview including the target).

14. As per claims 13 and 32, Landan teaches the system further wherein said predetermined criteria further include additional criteria selected from the group comprising: sizes of at least one of said first and said second system, speeds of at least

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one of said first and said second system, and availability of at least one of said first and said second system (Landan, see criteria of col. 5, lines 17-30 and fig. 1; col. 6, lines 6-20 and 44-46; see also overview of col. 7, lines 14-45).

15. As per claim 14, Landan teaches the system further wherein said first and said second system provides monitor functions across a network to said target (Landan, see col. 5, lines 52-67 and col. 8, lines 11-20 where monitoring and performance problem reporting are provided).

16. As per claims 15 and 33, Landan teaches the system further including the step of defining a catalog of potential system which meet said predetermined criteria and wherein said step of identifying a first and a second system is performed from said catalog of potential systems (Landan, col. 5, lines 17-30 and fig. 1 remote systems; see also col. 6, lines 6-20 and 44-46; see also overview of col. 7, lines 14-45).

17. As per claim 35, Landan teaches the system further wherein said systems provide load across a network to said target (Landan, col. 5, lines 17-30 and fig. 1 where load is provided to the target; see also col. 6, lines 6-20 and 44-46; see also overview of col. 7, lines 14-45).



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18. As per claims 37 and 38, Landan teaches the system further wherein said providing load emulates a real world environment (Landan, see col. 5, lines 17-30 and transactions of col. 6, lines 47-64 describing the emulation of a real world environment).

***Claim Rejections - 35 USC § 103***

19. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

20. Claims 7, 25, and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Landan (U.S. Patent 6,449,739) and Acker et al. (U.S. Patent 6,684,387).

21. As per claims 7 and 25, Landan teaches the above, yet fails to teach the system further wherein said software component is selected from the group consisting of EJB, Corba, COM, DCOM and COM+.

Acker teaches a method of performing distributed testing of object-oriented software components that are usable to build an application (Acker, fig. 1; col. 3, lines 41-57; col. 4, lines 48-60) including one selected from the group consisting of EJB, Corba, COM, DCOM, and COM+ (Acker, col. 3, lines 41-57). Acker achieves this testing by similarly providing a load and monitoring a target component (see Acker, col. 4, lines 25-47).

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It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have combined Landan and Acker to provide the method of Acker in the system of Landan, because doing so would enable a method of desirable distributed software component validation and verification (Acker, col. 2, lines 38-44) in a system that is designed to implement distributed network tasks on object-oriented software components (Landan, col. 4 line 63 to col. 5, line 11; see also col. 9, lines 39-55).

22. As per claim 34, Landan teaches the above, yet fails to teach the system further wherein said software component is selected from the group consisting of EJB, CORBA, COM, DCOM, and COM+.

Acker teaches a method of performing distributed testing of object-oriented software components that are usable to build an application (Acker, fig. 1; col. 3, lines 41-57; col. 4, lines 48-60) including one selected from the group consisting of EJB, Corba, COM, DCOM, and COM+ (Acker, col. 3, lines 41-57). Acker achieves this testing by similarly providing a load and monitoring a target component (see Acker, col. 4, lines 25-47).

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have combined Landan and Acker to provide the method of Acker in the system of Landan, because doing so would enable a method of desirable distributed software component validation and verification (Acker, col. 2, lines 38-44) in a system that is designed to implement distributed network tasks on object-oriented

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software components (Landan, col. 4 line 63 to col. 5, line 11; see also col. 9, lines 39-55).

### ***Conclusion***

23. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nicholas Taylor whose telephone number is (571) 272-3889. The examiner can normally be reached on Monday-Friday, 8:00am to 5:30pm, with alternating Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rupal Dharia can be reached on (571) 272-3880. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/NT/  
Nicholas Taylor  
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